STATE OF MICHIGAN
IN THE SUPREME COURT

DAIMLERCHRYSLER CORPORATION,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.
_____/

Supreme Court No. 130106

Court of Appeals No. 262518

Michigan Tax Tribunal No. 295872

130106

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Appellant's answer: No

Appellee's answer: Yes

The Tax Tribunal would answer: Yes

The Court of Appeals answer: Yes

II. The Petitioner pays motor fuel tax on its motor fuel purchases and claims it is not able to obtain a refund of its motor fuel taxes paid, and asserts that the payment of motor fuel tax without the opportunity to obtain a refund is a pre- and post-deprivation denial of due process. Was the Court of Appeals correct to affirm the Tax Tribunal's granting summary disposition for the Department of Treasury insofar as the tax refund process is constitutional?

Appellant's answer: No

Appellee's answer: Yes

The Tax Tribunal would answer: Yes

The Court of Appeals answer: Yes

Counter-Statement of Order Appealed From, Grounds for Denial of Application for Leave, and Relief Sought by Appellee

A. Jurisdiction

Petitioner-Appellant DaimlerChrysler Corporation filed pursuant to MCR 7.302 an application for leave to appeal on December 13, 2005 from a published decision dated November 1, 2005 of the Michigan Court of Appeals (File No. 262518) ("the opinion"). The opinion affirmed the Tax Tribunal's final decision that determined that DaimlerChrysler has not created a genuine issue of material fact as to whether it qualifies for a refund under the Motor Fuel Tax Act.[1] The Court of Appeals opinion is attached as Exhibit A. The Tax Tribunal's April 20, 2004 final decision is attached as Exhibit B. The proposed order granting the Department's motion for summary disposition and denying DaimlerChrysler's motion for summary disposition, dated September 23, 2004 is attached as Exhibit C.

B. Grounds for Denial of Leave to Appeal Under MCR 7.302(B).

This case involves the question of whether motor fuel that DaimlerChrysler places in vehicles it assembled in Michigan and sent via motor carrier to its dealers fits into a defined exemption from motor fuel tax liability, and whether DaimlerChrysler has met the requirements for receiving a refund of motor fuel taxes it paid. The grounds for appeal stated in MCR 7.302(B) are clearly not met as more fully explained in the Department's Counter-Statement of Facts and Arguments.

Pursuant to MCR 7.302(B)(1), there is no question as to the validity of a legislative act aside from the availability of a post-deprivation remedy which has been fully and properly addressed. The case is one brought against the State or one of its agencies but the other factors contained within MCR 7.302(B)(2) are not met as there is limited public interest in the

[1] 2000 PA 403, *as amended*, MCL 207.1001, *et seq*, effective April 1, 2001.

adjudication of the question of whether DaimlerChrysler is an "end user" of the motor fuel and whether it has furnished proofs of destination state taxes paid, which if furnished might allow a refund of motor fuel tax. The case does not involve legal principles of major significance to the State's jurisprudence, but merely involves issues relating to the application of long-standing principles of tax liability subject to limited exemptions under the applicable motor fuel statute. While the defined exemptions are new under the Motor Fuel Tax Act passed in 2000, the principles, including the strict construction of exemptions, do not present any new matters for this Court to resolve. For these reasons, MCR 7.302(B)(3) is not met.

Lastly, the application for leave to appeal must be denied for failure to meet the grounds under MCR 7.302(B)(5), as the decision of the Court of Appeals is not clearly erroneous and will not cause material injustice. The opinion does not conflict with a Supreme Court decision or other decisions of the Court of Appeals, as it is based upon a reading and interpretation of a particular Sales and Service Agreement that provides vehicle title and risk of loss is transferred to the dealer upon delivery to the motor carrier within this State, so DaimlerChrysler would not be the exporter entitled to a motor fuel tax refund. Also, in a new argument not mentioned before, DaimlerChrysler's Application for Leave to Appeal at p 10 erroneously implies that the Department's own policy interpretation is that motor fuel taxes do not apply to manufacturers such as DaimlerChrysler. In support of its contention, DaimlerChrysler cites at p 27 of its Application for Leave to Appeal, a Michigan Department of Treasury Letter Ruling (LR) 90-12. Contrary to DaimlerChrysler's position, LR 90-12, which makes reference to the former Michigan gasoline tax, was rescinded with the passage of the Motor Fuel Tax Act in 2000. DaimlerChrysler cannot use a rescinded letter ruling to establish error on the part of the Court of Appeals under MCR 7.302(B)(5).

There is no dispute that DaimlerChrysler placed, but did not combust, the motor fuel placed in the newly-assembled vehicles put onto motor carriers, and that it relinquished vehicle title and risk of loss to the dealer upon delivery to the motor carrier in Michigan. The Department submits that the motor fuel tax was lawfully paid, that DaimlerChrysler has not established it is entitled to a refund of tax under any exemption, and DaimlerChrysler is not the "end user" entitled to a refund for the motor fuel at issue.

This case fails to meet the requirements of MCR 7.302(B)(1), (2), (3) and (5). The Michigan Department of Treasury requests that DaimlerChrysler's Application for Leave to Appeal be DENIED.

Counter-Statement of Facts and Proceedings

A. Factual Background

Respondent-Appellee Michigan Department of Treasury disputes certain statements made in Petitioner-Appellant DaimlerChrysler's Summary of Issues and Case of Facts in the application for leave to appeal, pp 1-6. In the second paragraph of p 1, DaimlerChrysler claims that the Department "has thrown out some barrier – this time, the assertion that there is no mechanism at all under the MFTA to refund the tax to Daimler." DaimlerChrysler does not specifically identify what the Department barrier is, while the Tax Tribunal in its Proposed Order at p 15 found that the Department did not deny DaimlerChrysler a remedy, and the Court of Appeals in its opinion at pp 7-8 has determined that due process has not been denied. DaimlerChrysler also cites at p 1 of its application for leave, an earlier *DaimlerChrysler v Michigan Dep't of Treasury*[2] 2003 Court of Appeals opinion which decided a statute of limitations issue under the predecessor gasoline tax statute because refunds were allowed to a fuel "purchaser" under the old statutory language. DaimlerChrysler's Summary of Issues at pp 2-3 is wholly argumentative about the earlier case and is one-sided. Despite DaimlerChrysler's claim, since the former case was decided on the basis of the previous gasoline tax statute[3], that case cannot be treated as identical to this case. The previous statute allowed refunds to "purchasers" rather than "end users." For that reason, the Department recites its Counter-Statement of Facts as follows.

DaimlerChrysler seeks a refund of motor fuel tax in regard to motor fuel placed in vehicles newly-manufactured in Michigan and exported from the State. The fuel "remains in the

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[2] *DaimlerChrysler v Michigan Dep't of Treasury*, 258 Mich App 342; 672 NW2d 176 (2003).
[3] See the Gasoline Tax, MCL 207.101-207.106. Repealed by 2000 PA 403, eff. April 1, 2001. (As explained in the Tax Tribunal's proposed Order at p 11 (Appellee's Exhibit C) section 12 of the former act (MCL 207.12) could allow a refund to a "purchaser" of gasoline. . . . The current statute reads differently using the term "end user.")

fuel supply tanks of newly manufactured vehicles" (Amended Petition, ¶11) which are "shipped out of state via common carrier." (Amended Petition, ¶12) DaimlerChrysler filed a claim for refund of motor fuel taxes of $319,709 on or about June 29, 2001. (Amended Petition, ¶¶ 2, 8, and Exhibit A attached to it) DaimlerChrysler sent additional information quantifying vehicle production and motor fuel quantities. (Amended Petition, ¶ 3, and Exhibit B attached to it) The Department denied the claim for refund. (Amended Petition, ¶ 21, and Exhibit C attached to it) The taxes involved are Michigan motor fuel taxes paid pursuant to the Motor Fuel Tax Act.[4] (Amended Petitioner, ¶9) The Department explained its position that exporters be licensed in a letter addressed to motor fuel exporters. (Amended Petition, ¶22, and Exhibit C attached to it) DaimlerChrysler is not licensed as a motor fuel exporter. (Affidavit of Dale Vettel, ¶7, attached to the Department's Brief in Support of Motion for Summary Disposition ("Department's Brief in Support")). DaimlerChrysler has not shown that it has paid destination motor fuel taxes. (Affidavit of Dale Vettel, ¶8, attached to the Department's Brief in Support)

Contrary to the statements made at pp 4 and 7 of DaimlerChrysler's application for leave to appeal, the Department did **not** concur "that Daimler is not an exporter of motor fuel under MFTA provisions." The Department took the position that in order to obtain a motor fuel tax refund, the MFTA requires that a motor fuel exporter, including DaimlerChrysler, be licensed as an exporter; provide the Department with adequate proof of export; and request a refund under section 43 of MFTA.[5] (Affidavit of Dale Vettel, ¶9, and exhibits 1 and 2 attached to his affidavit, all attached to the Department's Brief in Support)

Discovery documentation indicates that DaimlerChrysler may not be the "exporter" as applied to the fuel at issue in this matter. DaimlerChrysler's Case Facts in its Brief on Appeal,

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[4] 2000 PA 403, as amended, MCL 207.1001, *et seq* (MFTA).
[5] MCL 207.1043

pp 2-7, and its Application for Leave to Appeal Statement of Facts, pp 3-6, ignore or fail to mention the sales and service agreement between DaimlerChrysler and its dealerships. During discovery, DaimlerChrysler provided a copy of a document entitled "Sales and Service Agreement: Additional Terms and Provisions." (Appellee's Exhibit D, p 8, ¶25) That document indicates that title and risk of loss for motor vehicles sold to a dealer will pass to the dealer upon delivery of the motor vehicle to the dealer, the dealer's agent or the carrier, whichever occurs first:

> Title to products CC [Chrysler Corporation] sells to DEALER hereunder and risk of loss will pass to DEALER upon delivery of the products to DEALER, DEALER'S agent, or the carrier, whichever occurs first. However, CC retains a lien for payment on the products so sold until paid in full, in cash. CC will receive negotiable instruments only as conditional payment.

B. Procedural Summary

The Department moved for summary disposition under MCR 2.116(C)(10) based upon its chief contention that DaimlerChrysler is not licensed as a motor fuel exporter, has not shown that it has paid motor fuel taxes to destination states, has not complied with MFTA requirements in order to receive a refund, and has no right to a MFTA refund. DaimlerChrysler filed its request for judgment based upon MCR 2.116(I)(2). The Department then filed its Response in Opposition to Petitioner's Request for Judgment pursuant to MCR 2.116(I)(2), wherein the Department asserted that DaimlerChrysler has no right to a refund since for vehicles placed on a carrier truck, title and risk of loss for motor vehicles sold to a dealer will pass to the dealer upon delivery of the motor vehicle to the dealer, the dealer's agent or the carrier, whichever occurs first, in Michigan.

On September 23, 2004, the Administrative Law Judge issued a Proposed Order granting Respondent's motion for summary disposition and denying Petitioner's motion for summary

disposition ("Proposed Order"). (Appellee's Exhibit C) Thereafter, DaimlerChrysler filed exceptions to the proposed order.

The Tax Tribunal issued an Order on November 22, 2004, to have the parties submit briefs on the legal issue relating to any refund of motor fuel tax under the MFTA, particularly section 33 or section 39 of MFTA[6], within 30 days of entry of the November 22, 2004 Order. The Tax Tribunal determined that a legal issue existed as to DaimlerChrysler's right to a refund as an end user under those provisions. The Department and DaimlerChrysler filed their briefs on the legal issue.

On April 20, 2005, the Michigan Tax Tribunal issued its Final Decision on the proposed order ("Final Decision") denying a refund. (Appellee's Exhibit B)

Pursuant to MCR 7.204(a)(1), DaimlerChrysler filed its Claim of Appeal with the Court of Appeals. On June 20, 2005 DaimlerChrysler filed its Brief on Appeal with the Court of Appeals. Oral argument followed. A published Court of Appeals Opinion was issued on November 1, 2005. (Appellee's Exhibit A) On December 13, 2005, DaimlerChrysler filed its Application for Leave to Appeal.

[6] MCL 207.1033 and MCL 207.1039.

Argument

In considering DaimlerChrysler's Application for Leave to Appeal, this Court must determine whether the Court of Appeals and Tax Tribunal were correct in deciding DaimlerChrysler is not an "end user" when it places motor fuel in supply tanks of vehicles assembled in Michigan for subsequent sale and shipment out of state via common carrier. The Department submits that the Court of Appeals and Tax Tribunal were correct in deciding that the exemptions in both sections 33 and 39 of MFTA[7] cannot be granted to DaimlerChrysler as a purchaser and user of motor fuel who transfers that fuel to another person for a subsequent use, and so DaimlerChrysler is thus not an "end user" of such motor fuel.

I. An end user of motor fuel may be entitled to a refund if the motor fuel is used in a manner exempt from liability under the Motor Fuel Tax Act. The Tribunal held that Petitioner is liable for the tax and not entitled to a refund for motor fuel placed in fuel tanks of vehicles assembled and shipped via motor carrier truck because it is not the end user of the motor fuel, and because Petitioner failed to show it is entitled to a refund. The Court of Appeals was correct in affirming the Tax Tribunal's granting summary disposition for the Respondent.

A. Standard of Review

The Court must determine "whether the lower court applied correct legal principles."[8] The standard of review that the court should apply is a *de novo* review.[9] The factual findings of the tribunal are to be upheld if they are supported by competent, material, and substantial evidence on the entire record.[10] Where a question of law is involved, the Court on appeal should exercise its own judgment.[11]

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[7] MCL 207.1033 and MCL 207.1039.
[8] *Boyd v Civil Service Commission*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).
[9] *Oakland County Treasurer v Title Office, Inc*, 245 Mich App 196, 200; 627 NW2d 317 (2001).
[10] *MCI Telecommunications Corp v Dep't of Treasury*, 136 Mich App 28, 30-31; 355 NW2d 627 (1984).
[11] *Daniels v Allen Industries, Inc*, 391 Mich 398, 413; 216 NW2d 762 (1974).

B. Analysis

1. Petitioner is liable for motor fuel taxes unless an exemption applies under the Motor Fuel Tax Act scheme.

In deciding whether to grant an application for leave to appeal, this Court must refer to the relevant statutory sections to understand the motor fuel tax scheme and the provisions for obtaining a refund. The tax refund claim is governed by the MFTA[12] that became effective as of April 1, 2001.

Subsection 8(1) of the MFTA[13] imposes the tax on motor fuel as follows:

> (1) Subject to the exemptions provided for this act, tax is imposed on motor fuel imported into or sold, delivered, or used in this state at the following rates:
>
> (a) Nineteen cents per gallon gasoline.
>
> (b) Fifteen cents per gallon on diesel fuel.

Subsection 8(6)(c) of the MFTA[14] provides:

> (6) It is the intent of this act:
>
> * * *
>
> (c) To allow persons who pay the tax imposed by this act and who use the fuel *for a non taxable purpose* to seek a refund or claim a deduction as provided in this act.

Section 85 of the MFTA[15] states in part as follows:

A person shall *not* export motor fuel from this state *unless* either of the following applies:

> (a) *The person is licensed as an exporter or supplier* under this act.
>
> (b) The person has *paid the applicable destination state tax to the supplier, can demonstrate proof of export in the form of a destination state shipping paper, and can demonstrate that the destination state fuel tax has been paid.*

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[12] 2000 PA 403, *as amended*, MCL 207.1001 *et seq.*

[13] MCL 207.1008(1).

[14] MCL 207.1008(6)(c). [emphasis added]

[15] MCL 207.1085. {emphasis added]

Subsection 3(o) and 2(f) of MFTA define categories of certain users. Subsection 3(o) of MFTA,[16] defines an "industrial end user" as follows:

> "Industrial end user" means a person who incorporates motor fuel into or uses motor fuel incidental to, industrial processing. Industrial end user includes a person who repackages motor fuel into containers that hold not more than 55 gallons of liquid *if the motor fuel is sold or used for a tax-exempt purpose.*

Subsection 2(f) of MFTA[17] defines a "bulk end user" as follows:

> "Bulk end user" means a person who receives into the person's own storage facilities by transport truck or tank wagon motor fuel for the person's own consumption.

Section 85(4) of MFTA[18] provides an exemption for persons who fill up and drive across state lines as follows:

> *An end user* who exports fuel in the fuel supply tank of a licensed motor vehicle where the fuel is used only to power the vehicle is exempt from this section.

Section 30 through 45 of MFTA[19] provide for various exemptions from tax, none of which apply here.

Sections 43 and 47 of MFTA address how a refund may be sought. Section 43 of MFTA[20] provides for the manner in which to claim a deduction for tax paid on motor fuel as follows:

> *A licensed exporter* may claim a deduction for tax paid under this act on motor fuel that was placed into storage in the state and was subsequently exported by transport truck or tank wagon by or on behalf of a licensed exporter if both of the following requirements are met:
> (a) Proof of export is available in the form of a destination state shipping paper that was acquired by a licensed exporter.
> (b) The motor fuel is fuel as to which the tax imposed by this act had previously been paid or accrued.

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[16] MCL 207.1003(o) [emphasis added]
[17] MCL 207.1002(f).
[18] MCL 207.1085(4). [emphasis added]
[19] MCL 207.1030-207.1045.
[20] MCL 207.1043 [emphasis added]

Section 47 of MFTA[21] provides:

> A person may otherwise seek a refund for tax paid under this act on motor fuel pursuant to Section 30 of 1941 PA 122, MCL 205.30. . . .

Section 30 of the Revenue Act, 1941 PA 122,[22] states, in part, as follows:

> (1) The department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under section 23 for deficiencies in tax payments.

There are other provisions for possible tax refunds for an end user. Section 33 of MFTA[23] provides as follows:

> *An end user* may seek a refund for tax paid under this act on motor fuel used by the person for nonhighway purposes. However, a person shall not seek and is not eligible for a refund for tax paid on motor fuel used in a snowmobile, off-road vehicle, or vessel as defined in the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106.

Section 39 of MFTA[24] provides:

> *An end user* may seek a refund for tax paid under this act on motor fuel used in an implement of husbandry or otherwise used for a nonhighway purpose not otherwise exempted under this act. However, a person shall not seek and is not eligible for a refund for tax paid on gasoline used in a snowmobile, off-road vehicle, or vessel as defined in the natural resources and environmental protection act, 1994 PA 451, MCL 324.101. to 324.90106.

In accordance with section 8 of the MFTA, tax is imposed on motor fuel imported into or sold, delivered, or used in this state unless some exemption under sections 30 through 45 of MFTA applies.

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[21] MCL 207.1047.
[22] MCL 205.30.
[23] MCL 207.1033. [emphasis added]
[24] MCL 207.1039. [emphasis added]

2. The Court of Appeals and the Tax Tribunal were correct in deciding the Petitioner is liable for Motor Fuel Tax based upon its use, and is not the "end user" entitled to a refund of the tax based upon some exempt use.

Under Section 8 of MFTA,[25] tax is imposed on the motor fuel imported into or sold, delivered, or used in this State. Tax is not imposed on motor fuel that is in the transfer/terminal system. The bulk transfer/terminal system is defined as "the motor fuel distribution system consisting of refineries, pipelines, marine vessels, and terminals."[26] The tax would be imposed upon the fuel's removal from bulk storage. DaimlerChrysler's use is downstream from the bulk transfer/terminal system. DaimlerChrysler's fuel possession involves the delivery, storage and use of the motor fuel in Michigan, and thus gives rise to DaimlerChrysler's liability for motor fuel tax.

The Department maintains that DaimlerChrysler is an exporter of motor fuel because it assembles vehicles in Michigan, the motor fuel is received in Michigan, and the vehicles and the motor fuel are exported from Michigan. In subsection 2(s) of MFTA,[27] "Export" means to "obtain motor fuel for . . . distribution outside of the state." DaimlerChrysler obtains large quantities of motor fuel that it places in vehicle fuel tanks and distributes the motor fuel in those vehicle fuel tanks via transport trucks to other States where the motor fuel will be used to power the vehicles on public roads.

This matter relates to the motor fuel placed in gasoline tanks of vehicles assembled in Michigan for subsequent sale and shipment out of State via common carrier. (Amended Petition, ¶¶ 11-12) The Department submits the matter does not pertain to industrial processing use, such as motor fuel combusted on dynamometers or in testing.

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[25] MCL 207.1008
[26] MCL 207.1002(i)
[27] MCL 207.1002(s)

Based upon established case law, the motor fuel is used by DaimlerChrysler, thus subjecting it to liability for MFTA tax. In previous litigation involving DaimlerChrysler, the nature of "use" was examined. In that previous DaimlerChrysler matter, the Tax Tribunal opinion in 2001 said:[28]

> Petitioner further argues that the MFTA does not apply because Petitioner does not "use" the motor fuel to propel vehicles on Michigan roads. Petitioner contends that to "use" the motor fuel it must be "consumed by combustion." Since the fuel remaining in the tanks of vehicles shipped outside of Michigan is not thus "used," Petitioner argues, the MFTA is not applicable. The Tribunal does not agree with interpretation of the word "use." Petitioner asks the Tribunal to create a dangerous precedent by insisting that the MFTA is not applicable to fuel in the tanks of vehicles shipped to other states. Under Petitioner's logic, all fuel purchased and placed in vehicles in Michigan but not consumed totally on Michigan roads is subject to a refund under the Revenue Act. Using such logic, drivers of vehicles who purchase gas in Michigan and then drive into other states could claim a refund on the gas not consumed in Michigan. A more consistent interpretation of "use" would be that *the fuel is used once it is taken out of storage and placed into vehicles*. Then, when the gasoline was not used to propel motor vehicles upon the roads of Michigan, Petitioner fell into an exempt category under the MFTA, and was entitled to a refund under its provisions. Thus, this Tribunal holds that the *MFTA is applicable to Petitioner's activities, and Petitioner must seek a refund according to the provisions of the MFTA.*

In the appeal of that *DaimlerChrysler* Tribunal decision, the definition of "use" was embraced by the Court of Appeals:[29]

> Petitioner also argues it is not included in the group entitled to a refund under MCL 207.101 *et seq.* because it did not "use" the fuel. However, the fuel tax act, MCL 207.101 *et seq.*, does not define "use." When a term is not defined in a statute, we must give the term its plain and ordinary meaning and may consult a dictionary definition. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). The word "use" is defined as "make use of, put to use, operate, employ." Random House Webster's College Dictionary (1999). Here, petitioner used the gasoline by removing it from storage and putting it into the vehicles petitioner produced, which were then driven onto a motor vehicle carrier.

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[28] *DaimlerChrysler Corp v Michigan Dep't of Treasury*, MTT Docket Nos. 272042 & 273137 at 15; 11 MTT 372, 379. (Appellee's Exhibit E) [emphasis added]

[29] *DaimlerChrysler Corp v Michigan Dep't of Treasury*, 258 Mich App 342, 345; 672 NW2d 176 (2003), *rev on other grds*, 469 Mich 1032, 679 NW2d 67 (2004).

Under this precedent, in this case there is use of the motor fuel in Michigan, and DaimlerChrysler is liable under the MFTA, subject to refund requests according to the provisions of the MFTA.

DaimlerChrysler would typically be considered an exporter of motor fuel, but DaimlerChrysler is not licensed as an exporter. In addition, based on DaimlerChrysler's own documentation (the Sales and Service Agreement (Appellee's Exhibit D)), where the vehicle is to be shipped out of state via carrier or transport truck, the Tax Tribunal decided DaimlerChrysler would not be an exporter of that motor fuel. Based upon the documentation, the transfer of title and risk of loss for the motor vehicles and the motor fuel in them occurred within the State of Michigan. When the transfer of title and risk of loss occurs upon delivery to the carrier or transport truck, DaimlerChrysler has effectively given up its control over the motor vehicles and the motor fuel in them. Nothing thereafter prevents the dealer or dealer's agent from diverting the vehicle to an in-state destination, or the motor vehicle to use on in-state public roads or highways. In such case, there is no provision for a refund of motor fuel tax where the motor fuel was transferred in-state. In such instances, DaimlerChrysler is not entitled to a MFTA tax refund. There is no evidence that DaimlerChrysler is the "end user" in this situation, nor is there evidence of an exempt use. Motor fuel is "used" by removing it from storage and putting it into the vehicles produced which were then driven onto a motor vehicle carrier, subjecting DaimlerChrysler to liability for tax. See the 2003 Court of Appeals decision, *DaimlerChrysler Corp v Michigan Dep't of Treasury, supra.*[30]

The "end user" would be the dealer or the consumer-purchaser of the vehicle, wherever they may be, as further explained below.

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[30] *DaimlerChrysler Corp v Michigan Dep't of Treasury*, 258 Mich App at 345.

3. Use of the term "end user" in MFTA is straightforward, and not ambiguous. The Court of Appeals was proper to resort to dictionary definitions to determine that Petitioner is not an end user of the motor fuel placed in its newly-assembled vehicles that are placed on motor carriers.

DaimlerChrysler claimed in its Brief on Legal Issue at p 2 (filed in response to the Tax Tribunal's November 22, 2004 Order) that the term "end user" is undefined so the term is ambiguous. DaimlerChrysler has since modified its argument. At p 15 of its Brief on Appeal in the Court of Appeals, and at p 14 of its application for leave to appeal in this court, DaimlerChrysler tries to draw a distinction between the phrase "the end user" as used by the Tax Tribunal and the Court of Appeals, and "an end user" as appears in sections 33 and 39 of MFTA.[31]

The MFTA does not define the words "end user" as those words are used in sections 33 or 39. The Tax Tribunal indicated in its Final Decision at p 4 that the words "end user" are subject to a "straightforward reading." The Court of Appeals at p 5 of the opinion gave the term its "plain and ordinary meaning," citing *Kootz v Ameritech Services, Inc.*[32] Accordingly the Court of Appeals held that "an end user of motor fuel is the ultimate user of the motor fuel, i.e., the party who uses the fuel to power the motor vehicle into which the fuel was placed." At p 5 of its opinion, the Court of Appeals properly resorted to dictionary definitions. "Reference to a dictionary is appropriate to ascertain what the ordinary meaning of a word is."[33]

The rules of statutory construction are well-established. "The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature."[34] "It is the function of

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[31] MCL 207. 1033; MCL 207.1039.
[32] *Kootz v Ameritech Services, Inc.*, 466 Mich 304, 312; 645 NW2d 34 (2002).
[33] *Popma v Auto Club Ins Assn*, 446 Mich 460, 470; 521 NW 2d 831 (1994).
[34] *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994).

a reviewing court to effectuate the legislative intent."[35] This primary task begins by examining the language of the statute itself; the words of a statute provide "the most reliable evidence of its intent. . . ."[36] "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted."[37] Interpretation to vary the plain meaning of a statute is precluded.[38] "In determining the meaning of the language in question we are obedient to the settled principle that doubtful or ambiguous provisions of a statute are not construed in isolation, but, rather, in the context of other provisions of the same statute to give effect to the purpose of the whole enactment."[39] A statute that is clear on its face and unambiguous is not open to interpretation by the courts.[40] The Legislature must be presumed to have intended the meaning expressed by the words it has chosen.[41] If the language used is clear and the meaning of the words chosen is unambiguous, a common sense reading of the provision will suffice, and no interpretation is necessary.[42] It is proper to accord the words their "plain and ordinary meaning."[43]

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[35] *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997).
[36] *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).
[37] *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 499-500; 628 NW2d 491 (2001).
[38] *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1, 5; 489 NW2d 115 (1992).
[39] *Guitar v Bieniek*, 402 Mich 152, 158; 262 NW2d 9 (1978).
[40] *City of Lansing v Twp of Lansing*, 356 Mich 641, 649; 97 NW2d 804 (1959).
[41] *Owendale-Gagetown School Dist v State Board of Education*, 413 Mich 1, 8; 317 NW2d 529 (1982).
[42] *Avon Twp v State Boundary Comm*, 96 Mich App 736, 752; 293 NW2d 691 (1980), *lv den* 410 Mich 853 (1980).
[43] See, *Michigan Bell Telephone Co v Dep't of Treasury,* 445 Mich 470, 478; 518 NW2d 808 (1994).

In fact, DaimlerChrysler itself has contended that to "use" the motor fuel it must be "consumed by combustion."[44] Consumption by combustion would be an "end use." The Court of Appeals in its opinion at p 3 properly affirmed the Tax Tribunal Final Decision that "while conceding that petitioner's placing the fuel in the vehicles' fuel tanks could be considered use, determined that it was not *end use*."

The Department submits the Tax Tribunal's and the Court of Appeals' interpretation of the term "end user" is straightforward and does not involved legal principles of major significance to the State's jurisprudence. The requirements of MCR 7.302(B)(3) are not met.

4. Since Petitioner is not an end user, the Court of Appeals and Tax Tribunal were correct in deciding Petitioner was not entitled to a motor fuel tax refund for the motor fuel placed in its newly-assembled vehicles that are placed on motor carriers.

The Tax Tribunal in its Proposed Order at p 12 (Appellee's Exhibit C), as adopted by the Final Decision, stated as follows:

> Petitioner is not an "end user as that phrase is used in MCL 207.1033, MCL 207.1039, or MCL 207.1044. The Michigan Court of Appeals has used the phrase "end user" with reference to consumers who purchase a produce at retail. *AMMEX, Inc v Department of Treasury*,[45] [relating to motorists who pumped gasoline into their vehicles' fuel tanks]; *Mohawk Data Sciences v City of Detroit*,[46] [relating to machines for sale on the retail market to an end user]; *Michigan National Bank v Department of Treasury*[47] [relating to use tax borne by the end user or consumer.]
>
> The Tribunal concludes that Petitioner's refund claim fails *whether or not it is the "exporter" of the fuel*. [emphasis added]
>
> The Tax Tribunal in its Final Decision at p 6 (Appellee's Exhibit B) ruled as follows:

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[44] See, *DaimlerChrysler Corp v Michigan Dep't of Treasury*, MTT Docket Nos. 272042 & 273137 (2001), at p 15, 11 MTT at 379.
[45] *AMMEX, Inc v Department of Treasury*, 237 Mich App 455: 603 NW2d 308 (1999).
[46] *Mohawk Data Sciences v City of Detroit*, 63 Mich App 102; 234 NW2d 420 (1975).
[47] *Michigan National Bank v Department of Treasury* 127 Mich App 646; 339 NW2d 515 (1983).

> By specifying that *an* 'end user' is entitled to the refund under the MFTA, the exemptions in both sections 33 and 39 cannot be granted to a purchaser and "user" of motor fuel who transfer that fuel to another person for a subsequent use. [italics added]

Given the Tax Tribunal's "straightforward reading" at p 4 of its Final Decision, an "end user" is the entity using the motor fuel at the end, i.e., the ultimate user. The Court of Appeals was correct in affirming the Tax Tribunal Final Decision and its rationale, so the requirements of MCR 7.302(B)(5) are not met.

5. The Tax Tribunal was correct in deciding that an "industrial end user" or a "bulk end user" is not an "end user" in the context of this matter.

DaimlerChrysler at p 15 of its Brief on Appeal claims by virtue of its injection of motor fuel into fuel tanks, that it is "an end user" of such motor fuel. Pursuant to sections 33 and 39 of MFTA,[48] an end user may seek a refund for tax paid on motor fuel used by the person for nonhighway purposes. The prior gasoline tax act referred to the "purchaser" as opposed to "end user" being able to seek a refund. However, the Court of Appeals (at p 5, footnote 5 of its opinion) and Tax Tribunal (at p 7 of the Final Decision) each agreed that DaimlerChrysler in this matter, as an "industrial end user" defined under subsection 3(o)[49] or "bulk end user" defined under subsection 2(f)[50] is not the "end user" of said motor fuel placed in supply tanks of vehicles assembled in Michigan for subsequent sale and shipment out of state via common carrier.

Despite DaimlerChrysler's claims to the contrary, a "bulk end user" is not an "end user." At pp 12-16 of its Brief on Appeal, and at p 20 of its Application for Leave to Appeal, DaimlerChrysler argues that it is a "bulk end user" under Section 2(f) of MFTA,[51] since it receives fuel into its own storage facilities by transport truck or tank wagon for its own

[48] MCL 207.1033 and MCL 207.1039.
[49] MCL 207.1003(o).
[50] MCL 207.1002(f).
[51] MCL 207.1002(f).

consumption. DaimlerChrysler claims it receives fuel into its own storage facilities and then consumes the fuel in the creation of its products. DaimlerChrysler uses, but does not consume the motor fuel with the placement of motor fuel in the vehicle tanks assembled in Michigan for subsequent sale and shipment out of state via common carrier. Such makes DaimlerChrysler a "bulk purchaser of fuel," but not the "end user" of the fuel eligible for a refund.

In the course of manufacture, DaimlerChrysler, while a user of motor fuel, does not consume or combust the fuel as the end user when the vehicles in which the fuel is placed are delivered by common carrier to various dealerships. In regard to industrial processing, the Court of Appeals opinion at p 6 was correct in deciding it "would not search the record for factual support for petitioner's claims."[52] Dynamometer or testing uses by DaimlerChrysler as an industrial end user involves the consumption, use, and combustion of the fuel, but those uses are not at issue in DaimlerChrysler's Petition and Amended Petition.

DaimlerChrysler's argument of motor fuel representing a component part of the automobile as analogized by DaimlerChrysler's reference, at p 19 of its application for leave, to Internal Revenue Service Rule 69-150 has no application or relevance on the interpretation of 'end user" under sections 33 and 39 of the MFTA. IRS Rev Rule 69-150 pertains to whether gasoline delivered into a fuel tank of a customer's automobile is exempt from the manufacturer's excise tax imposed on the sales of gasoline by the producer or importer of the gasoline.

The IRS revenue ruling pertains only to federal taxes, not to the issues contained in this matter. It is MFTA that determines who is liable for Michigan motor fuel tax, and who may be eligible for refunds. The Tax Tribunal, in its Proposed Order at p 15, and as adopted in the Final Decision, was correct in deciding that the IRS rulings are inapplicable.

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[52] The Court of Appeals opinion (Appellee's Exhibit A) citing *Derderian v Genesys Health Care System*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

The Department agrees that DaimlerChrysler *may* be an "industrial end user" in other circumstances (i.e., dynamometer use or testing) consistent with MCL 207.1003(o).[53] DaimlerChrysler is not an "end user" in regard to the issues raised in the Petition and Amended Petition and for the motor fuel placed in gasoline tanks of vehicles assembled in Michigan and shipped by common carrier to go elsewhere.

6. The Court of Appeals and the Tax Tribunal were correct in deciding that exemptions from taxation are not favored, and for that reason, the Court of Appeals decision is not clearly erroneous, and MCR 7.302(B)(5) is not met.

As recognized by the Court of Appeals in its opinion at p 3 (Appellee's Exhibit A), "although tax laws are construed against the government, tax-exemption statutes are strictly construed in favor of the taxing unit."[54] The Tax Tribunal reached the same conclusion in its Proposed Order at p 9 (Appellee's Exhibit C).

At p 21 of its Brief on Appeal, DaimlerChrysler acknowledged that "the MTT recognized that claims for exemption from taxation are strictly construed in favor of the taxing unit." Nevertheless, DaimlerChrysler at p 25 of its application for leave, claims the Court of Appeals attached an "unjustifiable narrow interpretation" to the circumstances in which a refund of tax may be made.

The Tax Tribunal and Court of Appeals properly applied the rules of statutory interpretation for exemptions. In general, tax laws are to be strictly construed and their scope may not be extended by implication or forced construction; and dubious language in tax laws is not be to resolved against the taxpayer. When there is doubt, tax laws are to be construed in

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[53] MCL 207.1003(o).
[54] Citing *Inter Co-op Council v Dep't of Treasury*, 257 Mich App 219, 222; 668 NW2d 181 (2003).

favor of the taxpayer.[55] However, the construction that this Court must place upon a tax exemption or deduction from tax is different. The Michigan appellate courts have consistently held that tax exemption statutes are to be strictly construed in favor of the taxing unit and exemptions are not to be lightly given or favored.[56] Since tax exemptions are disfavored, the burden of proving entitlement to an exemption rests on the party asserting the right to exemption.[57]

In *Evanston YMCA Camp v State Tax Commission*,[58] the rule of construction was succinctly set forth by this Court as follows:

> While it is true that the imposition provisions of a taxing statute should be construed in favor of the taxpayer, this rule of construction does not supplant or eliminate the important rule to be applied in the question here presented: That exemption provisions must be strictly construed in favor of the taxing agency.

There is no right to any particular deduction. In *Commissioner v Sullivan*,[59] the U.S. Supreme Court held: "[D]eductions are a matter of grace and Congress can, of course, disallow them as it chooses."

It is up to the Legislature to provide tax exemptions and deductions. It the Legislature has not clearly provided a tax exemption or deduction, the courts do not have the authority to provide such an exemption or deduction or to expand an exemption or deduction beyond that

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[55] *Michigan Bell Telephone Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994).
[56] *Edison v Michigan Department of Revenue*, 362 Mich 158, 162; 106 NW2d 802 (1961); *Doane v Pere Marquette Railroad Company*, 247 Mich 542, 545; 226 NW 245 (1929); *Tucker v Ferguson*, 89 US 527, 574; 22 Wall 527; 22 L Ed 805 (1874); *Bay Bottled Gas Company v Michigan Department of Revenue*, 344 Mich 326, 332; 74 NW2d 37 (1956).
[57] *Elias Brothers Restaurant v Dep't of Treasury*, 452 Mich 144, 150; 549 NW2d 837 (1996) as cited by the Tax Tribunal at p 3 of the Final Decision (Appellee's Exhibit B). See also, *Beckman Production Services, Inc v Dep't of Treasury*, 202 Mich App 342, 345; 508 NW2d 178 (1993).
[58] *Evanston YMCA Camp v State Tax Commission*, 369 Mich 1, 7-8; 118 NW2d 818 (1962).
[59] *Commissioner v Sullivan*, 356 US 27, 28; 78 S Ct 512; 2 L Ed 2d 559 (1958).

intended by the Legislature. To do so runs afoul of the Michigan Constitution,[60] by judicially crafting a tax exemption, credit or reduction, when such function is exclusively within the province of the legislative branch of government.

Given that tax exemption statutes are to be strictly construed in favor of the taxing unit and exemptions are not favored, the Court of Appeals and the Tax Tribunal were correct as a matter of law in strictly construing DaimlerChrysler's claims for exemption from taxation. DaimlerChrysler as the purchaser and user of the motor fuel, but not the end user, is not entitled to a refund under MFTA. The Court of Appeals decision strictly construing exemption provisions and affirming the Tax Tribunal Final Decision is not clearly erroneous and MCR 7.302(B)(5) is not met.

7. Petitioner's reliance on an old rescinded Letter Ruling to claim that the Motor Fuel Tax Act does not apply to manufacturers is misplaced.

In a new argument not properly raised or preserved below, DaimlerChrysler's Application for Leave to Appeal at p 10 erroneously implies that the Department's own policy interpretation is that motor fuel taxes do not apply to manufacturers such as DaimlerChrysler, and in support, at p 27 of the Application for Leave, DaimlerChrysler cites a Michigan Department of Treasury Letter Ruling (LR) 90-12. DaimlerChrysler at p 27 mistakenly claims that the decision of the Court of Appeals is clearly erroneous because the Court failed to take stock of the Department's own published pronouncement (LR 90-12) that fuel added to the tanks of manufactured motor vehicles shipped to non-Michigan destinations is not subject to the MFTA. DaimlerChrysler is trying to apply a 1990 letter ruling based upon a pre-MFTA statute to the current MFTA. Contrary to DaimlerChrysler's position, LR 90-12, which makes reference to the former

[60] Mich Const 1963, art 3, § 2.

Michigan gasoline tax,[61] was rescinded with the passage of the Motor Fuel Tax Act in 2000. LR 90-12 no longer appears in the Official Michigan Tax Guild. See the 1990 Letter Rulings in the 2001 Official Tax Guide at p 218, showing that LR 90-12 no longer appears. (Appellee's Exhibit F, p 218) DaimlerChrysler cannot use a rescinded letter ruling to establish error on the part of the Court of Appeals under MCR 2.302(B)(5).

8. The Court of Appeals and Tax Tribunal were correct in deciding that Petitioner is not entitled to a refund under MCL 207.1033 or MCL 207.1039, or any MFTA provision.

The Tax Tribunal in its Final Decision at p 6 (Appellee's Exhibit B) ruled as follows:

> By specifying that *an* "end user" is entitled to the refund under the MFTA, the exemptions in both sections 33 and 39 cannot be granted to a purchaser and "user" of motor fuel who transfers that fuel to another person for a subsequent use. [italics added]

The Court of Appeals in its opinion at p 5 (Appellee's Exhibit A) affirmed the rationale of the Tax Tribunal and succinctly stated:

> We conclude that, because the evidence demonstrates that petitioner did not use the fuel to power the vehicle or may have passed the fuel on to someone else who so used it, there is not genuine issue of fact as to whether petitioner was an end user of the fuel. Because petitioner was not an end user of the fuel at issue, it does not qualify, under either § 33 or § 39 of the MFTA, for a refund of motor fuel taxes paid.

As the Department noted above, DaimlerChrysler's Application for Leave to Appeal and its Brief on Appeal are silent about the Sales and Service Agreement (Appellee's Exhibit D). As established by DaimlerChrysler's own documentation -- the Sales and Service Agreement -- where the vehicle is to be shipped out of state via carrier or transport truck, the Court of Appeals and Tax Tribunal correctly concluded that DaimlerChrysler is not entitled to a MFTA refund if transfer of the motor fuel occurs in Michigan. When the transfer of title and risk of loss occurs

[61] See the Gasoline Tax, MCL 207.101-207.106. Repealed by 2000 PA 403, eff. April 1, 2001. See the Official Michigan Tax Guide.

upon delivery to the carrier or transport truck, DaimlerChrysler has effectively given up its control over the motor vehicle and the motor fuel in it.

DaimlerChrysler at pp 9-12 of its Brief on Appeal discussed the multitude of other refund provisions in MFTA. However, because of the transfer of title and risk of loss under the Sales and Service Agreement (Appellee's Exhibit D), the Court of Appeals in it opinion at p 7 (Appellee's Exhibit A) and Tax Tribunal in its Final Decision at p 8 (Appellee's Exhibit B) agreed that DaimlerChrysler has not established its right to a refund of motor fuel tax. Moreover, for instances of fuel export DaimlerChrysler is neither licensed as a motor fuel exporter under section 86 of the MFTA,[62] nor has it shown it has paid destination state motor fuel taxes. (See the Affidavit of Dale P. Vettel, attached to Respondent's Brief in Support of motion for summary disposition. See sections 85 and 86 of MFTA,[63] in regard to the requirements for export of motor fuel, and the requirements for licensure as an exporter.) If not licensed, DaimlerChrysler must comply with the requirements of subsection 85(1)(b) of MFTA.[64] That is the provision that requires either license as an exporter or furnishing a destination state shipping paper and demonstration that the destination state fuel tax has been paid.

DaimlerChrysler has not shown through evidence that it is entitled to a refund from motor fuel tax pursuant to sections 43 or 47 of MFTA.[65] Nor has DaimlerChrysler shown that it is entitled to a refund under the general tax refund provision of Section 30 of the Revenue Act.[66] DaimlerChrysler has not provided the requisite proofs such as proofs of motor fuel taxes paid

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[62] MCL 207.1086.
[63] MCL 207.1085 and MCL 207.1086.
[64] MCL 207.1085(1)(b).
[65] MCL 207.1043; MCL 207.1047.
[66] MCL 205.30.

elsewhere. There is limited public interest in this matter given the unique but undisputed facts of this case, whereby the Court of Appeals, as did the Tax Tribunal, decided that DaimlerChrysler has not shown it is entitled to a Motor Fuel Tax refund under any MFTA refund provision. For those reasons, MCR 7.302(B)(2) are not met.

In such case, there is no provision for a refund of motor fuel tax where the motor fuel was transferred in-state. DaimlerChrysler is not entitled to a refund under section 33 or section 39 or any other provision of MFTA.[67]

II. The Petitioner pays motor fuel tax on its motor fuel purchases, claims it is not able to obtain a refund of its motor fuel taxes paid, and asserts that the payment of motor fuel tax without opportunity to obtain a refund is a pre- and post-deprivation denial of due process. The Tax Tribunal was correct in granting summary disposition for the Department of Treasury because the tax refund process is constitutional, and the Court of Appeals was correct in affirming the Tax Tribunal.

A. Standard of Review

The Court must determine "whether the lower court applied correct legal principles."[68] The standard of review that the court should apply is a *de novo* review.[69] This Court reviews constitutional issues *de novo*.[70] The factual findings of the tribunal are to be upheld if they are supported by competent, material, and substantial evidence on the entire record.[71] Where a question of law is involved, the Court on appeal should exercise its own judgment.[72]

B. Analysis

At p 25 of DaimlerChrysler's Brief on Appeal, and again at p 29 of its Application for Leave to Appeal, DaimlerChrysler complains about it being deprived of both pre- and post-

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[67] MCL 207.1033 or MCL 207.1039.
[68] *Boyd v Civil Service Commission*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).
[69] *Oakland County Treasurer v Title Office Inc*, 245 Mich App 196, 200; 627 NW2d 317 (2001). *USAA Ins Co v Houston General Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996).
[70] *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).
[71] *MCI Telecommunications Corp v Dep't of Treasury*, 136 Mich App 28, 30-31; 355 NW2d 627 (1984). *Marrs v Board of Medicine*, 422 Mich 688, 693-694; 375 NW2d 321 (1985).
[72] *Daniels v Allen Industries, Inc*, 391 Mich 398, 413; 216 NW2d 762 (1974).

deprivation remedies in violation of its right to due process, claiming that the Administrative Law Judge dispensed with this contention without discussion, committing a clear error of law. The Tax Tribunal did not commit any error of law that deprived DaimlerChrysler of its due process rights. This Court should note that the exclusive and original jurisdiction of the Tax Tribunal is determined by statute.[73] The Tax Tribunal does not have the authority to hold statutes invalid.[74] Nonetheless, the Department disagrees with DaimlerChrysler's legal position on any alleged denial of due process.

DaimlerChrysler in its Request for Judgment pursuant to MCR 2.116(I)(2) complained that the Department does not provide a pre-deprivation remedy since it requires DaimlerChrysler to pay the motor fuel tax upon purchase, citing *Harper v Virginia Dep't of Taxation.*[75]

The Tax Tribunal, in its Proposed Order at p 15 indicated:

> Petitioner's arguments based upon *Henry Harper et al v Virginia Department of Taxation*[76] are without merit. Respondent has not denied Petitioner a remedy.
>
> The Tribunal concludes that Respondent has no statutory authority to grant Petitioner's request for a refund. "It is fundamental administrative law that administrative agencies are creatures of statute. The power they exercise is dependent on the grant in the statute." *Castro v Goemaere.*[77]

The Court of Appeals in its opinion at p 8 indicated:

> [T]he MFTA does provide that refunds are available under the specified circumstances set for in §§ 33 to 47. It also provides a procedure by which parties may obtain those refunds in § 48. Therefore, because it offers a meaningful post-depravation remedy, the MFTA does not violate due process requirements. The mere fact that petitioner does not *qualify* for a refund under any of the provisions of the MFTA, does not amount to a due process violation.

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[73] MCL 205.731.
[74] *Meadowbrook Village Associates v City of Auburn Hills*, 226 Mich App 594, 596; 574 NW2d 924 (1997).
[75] *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510 (1993).
[76] *Harper v Virginia Dep't of Taxation*, 509 US 86; 113 S Ct 2510 (1993).
[77] *Castro v Goemaere*, 53 Mich App 78, 79-80 (1974).

Case law supports the adequacy of due process in this case. *McKesson Corp v Div of Alcoholic Beverages and Tobacco* held that the Due Process Clause requires the state to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid.[78] *Reich v Collins* stands for the proposition that due process allows the State to maintain an exclusively post-deprivation regime, or a hybrid regime,[79] citing *Bob Jones University v Simon.*[80] In *Harper*, a suit over state taxation of federal civil service and military retirees, petitioners sought a refund of taxes erroneously or improperly assessed in violation of the nondiscrimination principle. In that case, the court held that under the Due Process Clause, a state found to have imposed an impermissibly discriminatory tax retains flexibility in responding to [the] determination.[81]

There is adequate due process protection in post-deprivation refund procedures. See, e.g., *Parratt v Taylor.*[82] In *Parratt*, respondent, an inmate of a Nebraska prison, ordered by mail certain hobby materials. After being delivered to the prison, the packages containing the materials were lost when the normal procedures for receipt of mail packages were not followed. In that case, the respondent was deprived of property under color of state law, but did not sufficiently allege a violation of the Due Process Clause of the Fourteenth Amendment. Nebraska had a procedure that provided a remedy to persons who have suffered a loss at the

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[78] *McKesson Corp v Div of Alcoholic Beverages and Tobacco*, 496 US 18, 22; 110 S Ct 2238; 110 L Ed 2d 17 (1990).
[79] *Reich v Collins*, 513 US 106, 111; 115 S Ct 547, 130 L Ed 2d 454 (1994).
[80] *Bob Jones University v Simon*, 416 US 725, 746-748; 40 L Ed 2d 496, 94 S Ct 2038 (1974).
[81] *Henry Harper v Virginia Dep't of Taxation*, 509 US at 100, citing *McKesson Corp v Div of Alcoholic Beverages and Tobacco, supra.*
[82] *Parratt v Taylor*, 451 US 527, 101 S Ct 1908, 65 L Ed 420 (1981).

hands of the state. Such procedure could have fully compensated respondent for his property loss and was "sufficient to satisfy the requirements of due process."[83]

In this case, the State has a process of appeal that satisfies the requirements of due process. If DaimlerChrysler was dissatisfied with having to pay the amount of motor fuel tax at the outset, it could have sought relieve at the Michigan Tax Tribunal.[84] There can be no enjoining the payment of tax.[85]

A taxpayer who wishes to challenge the constitutionality of a tax statute may do so in one of three forums:

> (a) in the Tax Tribunal, an aggrieved taxpayer may appeal from a decision of the Department of Treasury under MCL § 205.701 *et seq*. Even though the Tax Tribunal could not hold that a statute was unconstitutional, the question would be preserved for appellate review, where such questions could be addressed.
>
> (b) in the Court of Claims, a taxpayer may petition for refund of taxes under MCL § 600.6401 *et seq*.;
>
> (c) in the Circuit Court, a taxpayer may petition for declaratory judgment, under MCR 2.605.

Decision in each proceeding could have been appealed, if timely, to the Michigan Court of Appeals and the Michigan Supreme Court, and on to the United States Supreme Court should federal issues be involved. These options present a plain, speedy and efficient remedy. According to *Kistner v Milliken*, failure to timely invoke a plain, speedy and efficient remedy does not make the remedy inadequate.[86]

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[83] *Parratt v Taylor*, 451 US at 535-544.
[84] MCL 205.735
[85] MCL 205.28(1)(b). See also, *Kostyu v Dep't of Treasury*, 170 Mich App 123, 128; 427 NW2d 566 (1988).
[86] *Kistner v Milliken*, 432 F Supp 1001, 1007 (Ed Mich. 1977). See also, *Lake Lansing Special Assessment Protest Assoc v Ingham County Bd of Comm'rs*, 488 F Supp 767, 774-775 (WD Mich 1980).

Another case on point is *Rosewell v LaSalle Nat'l Bank.*[87] The respondent taxpayer in *Rosewell* sought, pursuant to 42 USC § 1983, to enjoin the Cook County, Illinois, Treasurer Rosewell from foreclosing on a tax lien on real property. The respondent taxpayer sought a declaration that the county treasurer had deprived her of equal protection and due process in violation of state and federal constitutions by over-assessing her real property. She further alleged a lack of a plain, speedy and efficient remedy at state law because she had to pay the tax prior to appealing the assessment and would receive no interest on a refund if successful. The Court found no violation of the taxpayer's rights and that the Illinois remedy was "a plain, speedy and efficient remedy."[88]

An adequate and complete remedy may be had in the state courts.[89] A remedy is "plain, speedy and efficient" when the taxpayer has the opportunity to pay the disputed tax and seek a refund.[90] A remedy is "plain, speedy and efficient' when the taxpayer has the opportunity to assert a defensive argument against the assessment or collection of a state tax in a judicial proceeding.[91] That the tax must be paid and a refund sought, even without interest, does not mean that a state remedy is not plain, speedy and efficient.[92] A state remedy "must provide the taxpayer with a full hearing and judicial determination at which the taxpayer may raise all constitutional objections to the tax.[93] DaimlerChrysler's argument at this late date about a pre-deprivation denial of due process by the levying of motor fuel tax on motor fuel purchased in bulk with no opportunity for a refund is without merit.

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[87] *Rosewell v LaSalle Nat'l Bank*, 450 US 503, 522; 101 S Ct 1221; 67 L Ed 2d 464 (1981).
[88] *Rosewell v LaSalle Nat'l Bank*, 450 US at 512-513, 517.
[89] *Wyandotte Chemicals Corp v City of Wyandotte*, 321 F 2d 927, 929 (6th Cir 1963).
[90] *Rosewell*, 450 U.S. at 517; *California v Grace Brethren Church*, 457 US 393, 417; 102 S Ct 2498; 73 L Ed 2d 93 (1982).
[91] *Ashton v Cory*, 780 F2d 816, 819-820 (9th Cir 1986).
[92] *Rosewell*, 450 US at 524-526.
[93] *Rosewell*, 450 US at 515.

This Court should conclude that the Tax Tribunal did not commit an error of law or adopt a wrong legal principle in deciding that the statutory scheme provided by MFTA does not offend constitutional due process requirements. The Court of Appeals was correct in affirming the Tax Tribunal Final Order. There is no material injustice, nor conflict with a Court of Appeals decision or Supreme Court decision. As to DaimlerChrysler's due process arguments, the requirements of MCR 7.302(B)(1) and (5) are not met.

Conclusion

This Court should deny DaimlerChrysler's application for leave to appeal because the requirements of MCR 7.302(B) have not been met. The Tax Tribunal and the Court of Appeals have each determined that DaimlerChrysler has not met the requirements for a refund of motor fuel tax for motor fuel placed in newly-assembled vehicles in Michigan and placed on common carriers for export. Under MCR 7.302(B)(2), the issues raised by the application do not raise significant public interest concern, given the unique DaimlerChrysler Sales and Service Agreement and facts of this case. DaimlerChrysler is not licensed as an exporter and failed to disclose its payments, if any, of motor fuel taxes to destination states. Under MCR 7.302(B)(3), this matter involves interpretation and application of the expressed and clear language of a statute, the Motor Fuel Tax Act, in its use of the term "end user," and does not involve legal principles of major significance to the State's jurisprudence. The Department of Treasury submits that DaimlerChrysler is not the end user of the uncombusted motor fuel placed in its newly-assembled vehicles slated for export by way of common carrier. The Court of Appeals opinion was not clearly erroneous, is not contrary to other Court of Appeals or Supreme Court decisions, and will not cause material injustice. So MCR 7.302(B)(5) is not met. Lastly, the Court of Appeals and the Tax Tribunal were correct in deciding that a post-deprivation process was available for seeking a refund, so for due process issues, MCR 7.302(B)(1) and (5) are not met.

The Tax Tribunal correctly granted the Department's Motion for Summary Disposition and that decision was supported by competent, material, and substantial evidence on the entire record. The Court of Appeals was correct in affirming the Tax Tribunal Final Decision.

Relief Sought

Respondent-Appellee Michigan Department of Treasury requests that this Court deny Petitioner-Appellant DaimlerChrysler's Application for Leave to Appeal.

Respectfully submitted,

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